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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

FRANCINE SILVER, Plaintiff and Appellant, v. GMAC MORTGAGE et al., Defendants and Respondents.	B289266 (Los Angeles County Super. Ct. No.SC118412)

APPEAL from a judgment of the Superior Court of Los Angeles County, Nancy Newman, Judge. Affirmed.

Gersten Law Group, Ehud Gersten for Plaintiff and Appellant.

Severson & Werson, Jan T. Chilton, Kerry W. Franich for Defendants and Respondents.

INTRODUCTION

Plaintiff Francine Silver appeals from the judgment entered following the trial court's granting of a motion for judgment on the pleadings in favor of defendants and respondents GMAC Mortgage, LLC (GMAC) and Ocwen Loan Servicing, LLC (Ocwen). The trial court found Silver's complaint alleging wrongful foreclosure was barred under the doctrine of res judicata, based on a prior New York bankruptcy case. Silver contends it would be inequitable to apply res judicata in this case, because she did not have a fair opportunity to litigate her claim. We disagree and affirm.

FACTUAL AND PROCEDURAL HISTORY

I. *Silver's Loan*

Silver, who is 93 years old, owns and occupies a residential property on Franklin Avenue in Los Angeles. In 2006, she obtained a $1.3 million refinance loan secured by a deed of trust encumbering her property. The deed of trust identified Nationwide Lending Group (Nationwide) as the lender, Mortgage Electronic Registration Systems, Inc. (MERS) as the beneficiary, and Land America Commonwealth as the trustee. GMAC became the servicer for the loan in December 2006.

On July 5, 2011, MERS assigned the deed of trust to GMAC. The assignment was signed by Jacqueline Keeley as assistant secretary on behalf of MERS, and notarized by Mary Lynch. The following day, July 6, 2011, GMAC substituted Executive Trustee Services, LLC (ETS) as the trustee under the deed of trust. The substitution was also signed by Keeley, as an "authorized officer" on behalf of GMAC, and notarized by Nikole Shelton.

On July 22, 2011, ETS initiated foreclosure proceedings by recording a notice of default and election to sell. The notice of default stated that Silver owed $58,595.72 on the loan. On October 21, 2011, ETS notified Silver that her property was scheduled for auction by the trustee on November 21, 2011.

II. *Silver's Bankruptcy Action*

The scheduled foreclosure sale of Silver's property was stayed when Silver filed a voluntary Chapter 7 bankruptcy petition in United States Bankruptcy Court for the Central District of California on November 14, 2011.

GMAC filed a motion for relief from the automatic stay, contending that its interest in the property was not adequately protected. Silver opposed the motion on the basis that GMAC lacked standing to foreclose. Specifically, Silver challenged the authenticity of the signatures purportedly executed by Keeley on the GMAC assignment and ETS substitution documents. Silver submitted a handwriting analysis report in which a handwriting examiner compared the two Keeley signatures and concluded that they were "probably written by two different people."

In February 2012, the California bankruptcy court denied GMAC's motion for relief without prejudice. The court found that Silver had established "a reasonable doubt as to the veracity of [GMAC's] basis for claiming the right to bring this motion." Citing the handwriting analysis submitted by Silver, the court noted that Keeley's signature "seems to differ between two documents" and appeared to be made by two different people. As such, the court concluded that "either somebody was forging signatures, or this is a blatant example of robo-signing."

Silver filed an adversary complaint in her bankruptcy proceeding on March 6, 2012, seeking to quiet title to the

property against GMAC and to enjoin further foreclosure proceedings. The same day, the California bankruptcy court issued a discharge to Silver; the bankruptcy case was then closed. In September 2012, the court granted GMAC's motion to dismiss the adversary proceeding, finding that it lost subject matter jurisdiction once Silver was discharged.

III. *GMAC's Bankruptcy Action*

In May 2012, GMAC's parent company, Residential Capital, LLC (ResCap) and affiliated entities, including GMAC, filed a Chapter 11 bankruptcy petition in United States Bankruptcy Court for the Southern District of New York. On June 4, 2012, Silver filed a $3 million general unsecured claim in the New York bankruptcy proceeding, alleging "mortgage litigation, fraud, [and] unjust enrichment." She attached a copy of her adversary complaint filed in the California bankruptcy action. In that adversary complaint, Silver alleged that one or both of Keeley's signatures on the assignment and substitution documents were forged, that MERS lacked the authority to assign the deed of trust to GMAC, and that therefore GMAC was "not the current owner of the beneficial interest in her loan."

The ResCap Borrower Claims Trust (borrower trust)[1] filed a lengthy objection to Silver's proof of claim in January 2015. The objection noted that the court had entered an order setting forth certain procedures to be followed before the debtors could object to certain categories of borrower claims. Pursuant to those procedures, the debtors mailed Silver a letter on June 21, 2013, requesting additional information and documentation in support

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[1]The borrower trust was established in the bankruptcy proceeding "as successor in interest to the [debtors] with respect to Borrower Claims."

of her claim. Silver submitted a response on July 9, 2013, including her loan payment history, various documents from her state action, and a forensic audit report.

In support of the objection, the borrower trust submitted the declarations of Keeley and three attorneys. In her declaration, Keeley stated that she had the authority to execute the assignment and substitution, and did in fact sign those documents.

Silver submitted an extensive response. She maintained that the Keeley signatures were fraudulent and that the assignment was invalid. Silver also argued that if the court was "inclined to give any consideration to Keeley's declaration, as she states she 'could and would testify,' she should be required to do exactly that." Silver also pointed to evidence related to "GMAC's residential loan foreclosure problems" including "fraud in documenting residential loan assignments." The borrower trust filed a reply and a supplemental declaration; Silver filed a surreply challenging the accuracy of the statements made in the supplemental declaration.

The bankruptcy court held a hearing on February 25, 2015, which Silver did not attend. At that hearing, the court concluded it would not rule on the objection to Silver's proof of claim "without first conducting a limited evidentiary hearing on the validity of the assignment—in short, the Court wanted to see and hear the testimony of Jacqueline Keeley, whose name and purported signature appears on the relevant documents." The court recognized the "concerns" expressed by the California courts,[2] but noted that neither court held an evidentiary hearing

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[2]The New York bankruptcy court specifically referred to the California bankruptcy court's findings regarding the signatures

to address the possible forgery. The court scheduled the evidentiary hearing for April 16, 2015 and provided notice to Silver.

Silver sent a letter to the bankruptcy court, which it received on April 15, 2015, the day before the scheduled evidentiary hearing. In the letter, Silver stated that she was recovering from a broken rib and was "physically unable" to attend the hearing. In addition, Silver stated that she "no longer ha[d] the financial wherewithal to attend the hearing." She also noted that she had not participated in the February 2015 hearing because "I only received notice that I could participate telephonically" the evening before the hearing. Silver's letter again outlined her claims regarding Keeley's signatures and the related findings of the courts in California. Further, she stated, "[t]o the extent anyone purporting to be Keeley is brazen enough to attend the hearing, nothing they say or present can be believed."

The evidentiary hearing proceeded on April 16, 2015. Silver did not appear in person or announce an appearance telephonically.[3] As summarized by the court in its order, Keeley testified under oath at the hearing "that she was an authorized signatory of [GMAC] and MERS at the time she executed the [GMAC] Assignment and the ETS Substitution." Keeley also

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in its order denying GMAC's motion for relief from stay. In addition, by this time Silver had filed the instant action in superior court in Los Angeles (discussed further in section IV) and that court had granted her motion for a preliminary injunction based on her arguments regarding the signatures.

[3]Although she did not state an appearance, in subsequent filings Silver admitted that she attended the hearing telephonically via Court Call.

testified that she personally signed the assignment on behalf of MERS on the day it was dated, and that the assignment was notarized by Lynch, a GMAC employee. Similarly, Keeley confirmed that she signed the substitution on the day it was dated and had it notarized by Shelton, another GMAC employee. Keeley stated that both Lynch and Shelton worked in the same office she did and often notarized documents she signed. Finally, Keeley acknowledged that her signatures on the two documents "appeared slightly different" from each other, but stated that her signatures were not always identical and "unequivocally stated that her actual signature appears on each document."

After the hearing, Silver attempted to submit additional evidence to the court challenging Keeley's credibility. In a letter received by the court on April 22, 2015, Silver noted purported "inconsistencies" between Keeley's written declaration and oral testimony, and asserted that Keeley's testimony was "quite simply unbelievable." She also submitted evidence purporting to show "robo-signing" and other fraudulent conduct by notaries Shelton and Lynch. The court declined to consider "these untimely and inappropriate supplemental findings."

On June 24, 2015, the court issued a written order sustaining the objection to Silver's claim. Based on "the uncontroverted evidence presented at the Limited Evidentiary Hearing, and the papers submitted in support of the Objection," the court found that "no forgery occurred in preparing, signing or notarizing" the assignment. The court also noted the documentation submitted by the borrower trust "establishing the validity of the Debtors' authority to commence foreclosure on the Property."

After detailing the evidence presented, the court found that Keeley's testimony at the evidentiary hearing was "truthful and persuasive. The Court expressly finds that Keeley signed each of these documents and her signature was notarized by other [GMAC] employees in the same office who knew Keeley and regularly notarized documents with Keeley's signature." The court also noted that Silver "did not appear at the Limited Evidentiary Hearing and cross examine Keeley despite having an opportunity to do so." Accordingly, the court found that the trust met its burden of establishing that GMAC "had standing to foreclose on the Property and properly proceeded to do so under California law, and Silver has not put forth sufficient evidence supportive of her wrongful foreclosure cause of action in response."

Silver appealed the bankruptcy court's order to the district court in New York. In her brief on appeal, she acknowledged that she attended the evidentiary hearing via Court Call.[4] However, she contended that she was "advised that she could listen in but had to have special permission to participate. Silver was not sure of what exactly the order allowing her to attend by telephone entailed so she chose to only listen in." She also stated that she "was of the opinion that her presence at the hearing would be futile because no matter how convincing an argument she put

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[4]Respondents filed an unopposed request on appeal seeking judicial notice of (1) the Supreme Court's denial of Silver's petition for writ of certiorari; and (2) Silver's appeal brief to the district court in New York. They contend the latter document is relevant to Silver's claim that she did not attend the bankruptcy evidentiary hearing. We grant respondents' request and take judicial notice of these documents.

forth she expected to lose due to the Judge's lack of impartiality." That court affirmed.

In particular, the district court rejected Silver's argument that the bankruptcy court improperly credited Keeley's testimony. The district court concluded that Silver had "ample opportunity" to contest the evidence but failed to do so, "despite apparently listening in via telephone" to the hearing. Silver then appealed to the United States Court of Appeals for the Second Circuit, which affirmed the judgment. Finally, Silver petitioned for a writ of certiorari to the United States Supreme Court; that writ was denied in April 2018.[5]

IV. *Silver's State Action*

A. *Complaint*

Meanwhile, Silver filed her complaint in this action in September 2012 against GMAC. She filed a first amended complaint in June 2013, adding Ocwen as a defendant and alleging that Ocwen had replaced GMAC as successor servicer. Silver filed the operative second amended and supplemental complaint (SAC) in April 2014, seeking declaratory and injunctive relief against GMAC and Ocwen.

In her SAC, Silver alleged wrongful foreclosure by GMAC. As relevant here, Silver alleged that the purported assignment and substitution containing the Keeley signatures were

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[5]Silver also filed numerous other motions and appeals in the bankruptcy action, including a motion seeking immediate payment in March 2014, a motion for reconsideration when that motion was denied, a notice of appeal to the district court in April 2014, a notice of appeal to the Second Circuit in July 2014, a petition for writ of certiorari with the United States Supreme Court in April 2015, and multiple motions for default judgment based on purportedly untimely filings by the borrower trust.

fraudulent. She sought a declaratory judgment that GMAC's notice of default was void and that "GMAC has no right, title, or interest in the Property." She also sought injunctive relief barring GMAC or Ocwen from taking any further action to foreclose on the property.

B. *Preliminary injunction*

In May 2014, Silver moved for a preliminary injunction to stop the foreclosure. Among other evidence, she submitted the handwriting analysis report regarding the Keeley signatures. The court granted the preliminary injunction, finding that there was "substantial evidence that one or more documents on which defendants rely for their claims are fraudulent or contain fraudulent signatures." Specifically, the court found "strong reason to doubt the validity of the written assignment because the signatures . . . by purported MERS secretary Jacqueline Keeley do not match. . . . Notably, GMAC has failed to meaningfully address Plaintiff's argument that its standing as beneficiary...is called into question due to the inconsistent signatures by Keeley."

C. *Motion for judgment on the pleadings*

Respondents answered the complaint and then moved for judgment on the pleadings in November 2017. Respondents argued that Silver's claims were barred by res judicata based on the New York bankruptcy court's June 2015 order. Silver opposed. She argued that collateral estoppel did not apply because the New York bankruptcy order conflicted with the California bankruptcy court's order on the issue of the assignment, and further that it would be inequitable to apply collateral estoppel because she was unable to fully and fairly litigate the issue in the prior case. She also argued that her

complaint set forth viable grounds for relief even if the assignment to GMAC was valid. Both sides requested that the court take judicial notice of various documents from the other proceedings.

The trial court granted the motion in full without leave to amend in December 2017. First, the court found that Silver's claim for declaratory relief failed as a matter of law. Second, with respect to the issue of the signatures, the court took judicial notice of the "existence of the bankruptcy court's records and the *legal effect* of those orders." The court found that Silver's inability to attend the bankruptcy evidentiary hearing "has no bearing on the preclusive effect of this ruling," nor did it "shift[ ] the inequities in favor of [Silver]." Moreover, the court rejected Silver's argument that she had no opportunity to litigate the bankruptcy matter, concluding that her "remedy to the court's apparent[ ] refusal to continue the hearing was to seek relief from appellate courts." The court accordingly concluded that Silver had not sufficiently demonstrated that the New York bankruptcy proceeding "does not bar [Silver's] claims arising from her forged signature arguments based on the doctrine of res judicata."

Judgment of dismissal was entered in favor of respondents on December 22, 2017. Silver timely appeals.[6]

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[6]Silver was represented by attorney Ehud Gersten throughout her California bankruptcy proceeding, and throughout the trial court proceedings in this state action. Gersten also filed the opening brief in this appeal on Silver's behalf. However, Silver filed her reply brief in propria persona. She also represented herself throughout the New York bankruptcy proceedings, although she listed Gersten on her proof of claim when asked to identify where notices should be sent.

DISCUSSION

In her opening brief on appeal, Silver challenged only the trial court's res judicata findings. We agree with the trial court that the doctrine bars Silver's claim and therefore that judgment on the pleadings was proper. Moreover, to the extent Silver seeks to raise additional issues in her reply brief, those issues are forfeited.

I. *Standard of Review*

"In an appeal from a motion granting judgment on the pleadings, we accept as true the facts alleged in the complaint and review the legal issues de novo. 'A motion for judgment on the pleadings, like a general demurrer, tests the allegations of the complaint or cross-complaint, supplemented by any matter of which the trial court takes judicial notice, to determine whether plaintiff or cross-complainant has stated a cause of action. [Citation.] Because the trial court's determination is made as a matter of law, we review the ruling de novo, assuming the truth of all material facts properly pled.'" (*Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 166.)

II. *Claim and Issue Preclusion (Res Judicata)*[7]

"'The doctrine of res judicata gives certain conclusive effect to a former judgment in subsequent litigation involving the same controversy.'" (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 797.) "The doctrine "has a double aspect." [Citation.] "In its primary aspect," commonly known as claim preclusion, it

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[7]Our Supreme Court has shifted away from the traditional phrases "res judicata" and "'collateral estoppel'" in favor of the more precise terms "'claim preclusion'" and "'issue preclusion.'" (See *DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824.) We follow that practice here.

"operates as a bar to the maintenance of a second suit between the same parties on the same cause of action. [Citation.]"" (*Ibid.*) "In its secondary aspect," commonly known as collateral estoppel or issue preclusion, "[t]he prior judgment . . . 'operates'" in "a second suit . . . based on a different cause of action . . . 'as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action.' [Citation.]" (*Ibid.*)

"Claim preclusion 'prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them.'" (*DKN Holdings LLC v. Faerber, supra,* 61 Cal.4th at p. 824.) Claim preclusion arises if a second suit involves: (1) the same cause of action (2) between the same parties (3) after a final judgment on the merits in the first suit. (*Ibid.*) If claim preclusion is established, it operates to bar relitigation of the claim altogether.

"Issue preclusion prohibits the relitigation of issues argued and decided in a previous case, even if the second suit raises different causes of action." (*DKN Holdings LLC v. Faerber, supra*, 61 Cal.4th at p. 824.) Issue preclusion applies: (1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party. (*Id.* at p. 825.)

The doctrine "rests on the principle that a plaintiff is entitled to only one fair opportunity to litigate a given cause of action." (*Ferraro v. Camarlinghi* (2008) 161 Cal.App.4th 509, 531 (*Ferraro*).) "Its purpose is to limit the burden a plaintiff may impose upon the judicial system and upon prospective defendants on account of a single injury." (*Ibid.*; see also *Parklane Hosiery*

Co. v. Shore (1979) 439 U.S. 322, 326 ["Like res judicata, collateral estoppel 'has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation.'"].)

III. *Analysis*

The parties appear to disagree about whether this case involves claim or issue preclusion. Regardless, Silver does not dispute that all of the elements have been met: (1) in her declaratory relief claim here and in the New York bankruptcy proceeding, Silver raised the same challenge to foreclosure by arguing that respondents lacked the authority to enforce the note and deed of trust; (2) the bankruptcy court's order sustaining the objection to Silver's claim was final and on the merits;[8](3) she was a party to that proceeding; and (4) Silver's challenge to defendants' authority to proceed with the foreclosure was expressly rejected by the bankruptcy court, therefore actually litigated and necessarily decided in that proceeding.

Instead, Silver relies on an exception made to application of the doctrine, citing cases allowing relitigation of an issue "if injustice would result or if the public interest requires that relitigation not be foreclosed." (*Ferraro, supra*, 161 Cal.App.4th at pp. 531–532; see also *Smith v. ExxonMobil Oil Corp.* (2007) 153 Cal.App.4th 1407, 1414 (*Smith*) ["Conceding that all three factors are present in this case, Mobil emphasizes the equitable

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[8]See *Siegel v. Federal Home Loan Mortg. Corp*. (9th Cir. 1998) 143 F.3d 525, 529 [holding that the "allowance or disallowance of 'a claim in bankruptcy is binding and conclusive on all parties or their privies, and being in the nature of a final judgment, furnishes a basis for a plea of res judicata'"].

nature of collateral estoppel and that even where the technical requirements are all met, the doctrine is to be applied 'only where such application comports with fairness and sound public policy.'"].) Specifically, Silver argues that she was not afforded a "full and fair opportunity to litigate" her claim in the bankruptcy proceeding, as she was unable to attend the hearing or present subsequent evidence.

We are not persuaded that Silver was denied a full opportunity to litigate her claim. She contends that it was unfair for the bankruptcy court to proceed with the evidentiary hearing when she was unable to attend in person and therefore could not cross-examine Keeley. But Silver does not explain why she could not appear telephonically, present evidence, and cross-examine the witness. Indeed, her first letter to the court recognized the availability of Court-Call for a telephonic appearance. Moreover, she did not expressly request a continuance of the hearing. She simply stated that she could not attend in person for financial and physical reasons, and explained why she had not attended the prior hearing telephonically. From her later filings, it is apparent that Silver did in fact listen to the hearing by phone, although she made the choice not to speak. She did not object to the hearing or raise any issues with her presence by Court-Call. As such, she has made no showing that court acted unreasonably by holding the hearing as scheduled.

Further, there is no dispute that Silver had multiple opportunities to present her arguments to the bankruptcy court regarding the authenticity of the Keeley signatures. She attached her prior adversary complaint to her initial proof of claim, detailing the relevant allegations. She also addressed the issue in her response to the objection by the borrower trust, as

well as her sur-reply. She also had the opportunity, pursuant to the court's procedures, to present evidence supporting her claim before any objection could be filed. Moreover, the bankruptcy court expressly considered her arguments, as well as the findings made by the California courts, and called for the evidentiary hearing for the specific purpose (as requested by Silver) of receiving testimony from Keeley regarding the signatures. Although Keeley was not cross-examined, the court did question her regarding the discrepancies in her signatures, and found her explanation credible. Silver's belief that the court should have weighed her handwriting expert's opinion more heavily than Keeley's testimony does not render the process unfair. Notably, Silver cites no cases in which a party's decision not to cross-examine a witness established that party lacked a full and fair opportunity to litigate a claim.

Similarly, we reject Silver's contention that the bankruptcy court unfairly restricted her presentation of evidence by refusing to accept her post-hearing submissions. She has offered no explanation as to why she failed to submit the evidence to impeach Keeley, Lynch, and Shelton prior to the evidentiary hearing, or why it was error for the court to find her submission after the hearing untimely.

The cases cited by Silver do not support her contention that the equities warrant relitigation in this case. For example, the court in *Barker v. Hull* (1987) 191 Cal.App.3d 221, noted that the party asserting collateral estoppel must prove that an issue was actually litigated, but "need not establish that any particular type of evidence, such as oral testimony, was presented." (*Id*. at p. 226 [affirming grant of motion for judgment on the pleadings based on collateral estoppel].) By contrast, in *Smith, supra*, 153

Cal.App.4th at p. 1420, the court reversed the application of collateral estoppel under the "unusual and compelling circumstances" of the case. In the prior case, an asbestos personal injury action, the only defense expert prepared to testify on crucial issues, including causation and the applicable standard of care, was unable to testify at trial due to the sudden death of his daughter. (*Ibid.*) The defendant was unable to find another expert on short notice prior to the conclusion of trial, nor was a continuance feasible due to the plaintiff's failing health. (*Id.* at p. 1412.) The jury found defendant liable and in a subsequent wrongful death action, the plaintiff's widow and children sought to bar relitigation of the defendant's liability based on collateral estoppel. (*Ibid.*) The appellate court concluded that defendant's "inability, through no fault of its own, to produce evidence on these crucial issues makes it impossible to say that the prior trial provided it a full and fair opportunity to present a defense." (*Id.* at p. 1420.)

Here, on the other hand, Silver has failed to establish that she was unable to present evidence supporting her claim that the Keeley signatures were invalid. Although she was unable to attend the hearing in person due to an injury, she has not shown that she was restricted from litigating her claim through other means, including written submissions prior to the hearing and telephonic attendance at the hearing. We also note that she later stated she decided not to attend the hearing because she felt it would be futile, rather than solely because she was unable to do so.[9] As such, we find claim preclusion applies to bar Silver's complaint.

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[9]We also reject Silver's contention that applying collateral estoppel would be inequitable because she "lacked the incentive

Finally, we note that Silver's reply brief, styled as a "combined reply to respondents' brief, notice of fraud upon the court, and motion for summary judgment," raises a multitude of issues she did not address in her opening brief. These issues are forfeited and we decline to reach them. (See *Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 761, fn. 4 [declining to consider argument made in reply]; *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 895, fn. 10 [""points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before. . . ."""].)

DISPOSITION

The judgment is affirmed. The parties are to bear their own costs on appeal.

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COLLINS, J.

We concur:

WILLHITE, ACTING P.J.

MICON, J.*

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to litigate in New York." This argument is not supported by any authority. Moreover, it is belied by the extensive litigation activity Silver undertook in the New York bankruptcy action.

* Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.